promisor was legally compellable to do. The logging work done by the respondent was not voluntary nor can the work of extracting timber be described as something which the appellants were legally compellable to do. In our view the promise to pay the extra $1/- per ton cannot come under the purview of section 26(b).

Both the appeal and cross-appeal must be dismissed and we order that each party should bear its own costs. The appellants must of course pay the costs in the court below. The deposit to be refunded.

*Order accordingly.*

Solicitors: *Shook Lin & Bok; Lawrence & Joseph.*

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## TAY TONG CHEW & ANOR. v. ABDUL RAHMAN BIN HAJI AHMAD

**[F.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi and Hashim Yeop A. Sani F.JJ.) June 19 & August 18, 1984]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 250 of 1983]**

*Tort – Road Accident – Negligence – Contributory negligence – Damages – Proof of special damages – Pain and suffering and loss of amenities – Loss of earning capacity.*

*Damages – Knee – Amputation above – Future earnings – Quantum not agreed – Duty of court.*

The respondent was on his way home on his motorcycle when he was knocked down by a motor car driven by the second appellant and owned by the first appellant. He sued the appellants for damages. The learned Judicial Commissioner who heard the case found the collision was caused by the negligence of the motor car driver and awarded the respondent $70,000/- general damages for pain and suffering and loss of amenities. He allowed the sum of $1,170/- for special damages and also awarded a sum of $18,000/- for the cost of the hip and knee joint operation and $500/- for the purchase of special shoes. He also held that the respondent was entitled to damages for loss of future earnings but he left it to the solicitors of both parties to work out the award. The appellants appealed.

**Held:** (1) there was evidence to support the conclusion that the second appellant did not stop at the "Stop, Look Go Sign" at the junction before turning right into the main road and he was therefore guilty of negligence in colliding with the respondent. The collision could not have occurred if the appellant's motor car had stopped at the junction and allowed the respondent's motorcycle which had the right of way to pass the junction completely before turning right into the main road. The respondent was blameless and was not guilty of contributory negligence;

(2) it is the function of the court to assess damages and where the quantum is not agreed on by the parties on any item as in the present case, it is both unreasonable and undesirable to order them to assess the damages themselves;

(3) having regard to the trend of awards on leg amputation above the knee, the award of $70,000 for pain and suffering and loss of amenities in this case was a wholly erroneous estimate of the damage suffered. The award is manifestly excessive and the award should be reduced to $40,000/- which is a fair and equitable compensation under this item;

(4) loss of future earnings had not been proved in this case but the respondent should be compensated for injury to his earning capacity. Taking into account all past and future contingencies, an award of $12,000/- for loss of earning capacity would be fair and adequate in this case;

(5) the award of special damages should be reduced to $300/- as there was only evidence to support this amount, the claim for special shoes should be set aside for lack of evidence that such shoes were required by the respondent but the award of $18,000/- for cost of surgical operation should remain.

*Cases referred to:*

(1) *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.* [1969] 1 M.L.J. 49.
(2) *Tan Tsin Keong* v. *A. Somanaidu* F.C.C.A. No. 23 of 1972.
(3) *Lim Soon Poh* v. *Ng Kong Lum* [1975] 2 M.L.J. iii.
(4) *Tan Thua Chye* v. *Tan Chun Eng* K.S. Dass on Quantum Vol. 2 p. 142.
(5) *Abdul Wahab bin Kachi Mydin* v. *Gan Ah Hoe* [1978] 1 M.L.J. 186.
(6) *Marie De Cruz* v. *Loo Siew Kong* K.S. Dass on Quantum Vol. 2 p. 354.
(7) *Teh Hwa Seong* v. *Chop Lim Chin Moh & Anor.* [1981] 2 M.L.J. 341.
(8) *Shari bin Abdul Rahman* v. *Attorney-General* [1979] 1 M.L.J. xxxix.
(9) *Tay Yong Kee* v. *Ng Aik Peng* K.S. Dass on Quantum Vol. 2 p. 276.
(10) *Chan Chook How* v. *Tan Nyoke Hoe* [1979] 1 M.L.J. xxxix.
(11) *M.U. Abdullah s/o Mohamed* v. *Mohamed Mazir bin Mohamed Hassam & Anor* K.S. Dass on Quantum Vol. 2 p. 274.
(12) *Lim Meng Choo & Anor.* v. *Paya Lebar Bus Service* [1975] 2 M.L.J. iv.
(13) *Elangovan* v. *Lee Yew Kow & Anor.* [1977] 1 M.L.J. lxxx.
(14) *Mahmood bin Kailan* v. *Goh Seng Choon & Anor.* [1976] 2 M.L.J. 239.
(15) *Murugan s/o Poomile* v. *Lew Chu Cheong* K.S. Dass on Quantum Vol. 2 p. 266.
(16) *Ibrahim bin Samsudin* v. *Kong Pak Kooi* K.S. Dass on Quantum Vol. 2 p. 266.
(17) *Yen Kwai Lan* v. *Lim Eng Hin* K.S. Dass on Quantum Vol. 2 p. 267.
(18) *Seenivasan & Anor.* v. *Lim Yew Seng* [1961] M.L.J. 22.

(19) *Low Ah Tow* v. *Yusof bin Kayab* [1954] M.L.J. 112.
(20) *Ngooi Ku Siong & Anor.* v. *Aidi Abdullah* [1985] 1 M.L.J. 30.
(21) *K. Ratnasingam* v. *Kow Ah Dek & Anor.* [1983] 2 M.L.J. 297.
(22) *Lim Eng Kay* v. *Jaafar bin Mohamed Said* [1982] 2 M.L.J. 156.
(23) *Fairley* v. *John Thompson Ltd.* [1973] 2 Ll. L.R. 40, 42.
(24) *Ti Huck & Anor.* v. *Mohamed Yusof* [1973] 2 M.L.J. 62, 66.
(25) *Yang Salbiah & Anor.* v. *Jamil bin Harun* [1981] 1 M.L.J. 292; [1984] 1 M.L.J. 217.

FEDERAL COURT.

*Guy Vareghese* for the appellants.
*S. Kulasegaran* (*Y.L. Tho* with him) for the respondent.

*Cur. Adv. Vult.*

**Mohamed Azmi F.J.** (delivering the Judgment of the Court): On April 30, 1976 at about 4.30 p.m. the respondent was on his way home on his motor cycle when he was knocked down by a motor car driven by the second appellant at the junction of Jalan Abdul Rahman/Jalan Sultan Ibrahim, Muar, Johore. In March 1980 he sued the appellants for damages for personal injuries and consequential loss caused by the negligent driving of the second appellant who was the servant or agent of the first appellant – the registered owner of the motor car. The learned Judicial Commissioner in the High Court found the collision was solely caused by the negligence of the motor car driver and awarded the respondent $70,000/- general damages for pain and suffering and loss of amenities with interest at 6% per annum from April 10, 1980 to date of judgment (August 25, 1983). Under special damages he allowed the sum of $1,170/- with interest at 3% per annum from date of accident. A further sum of $18,000/- was allowed for cost of hip arthroplasty and knee joint operation, and another $500/- for the purchase of special shoes. He also held that the respondent was entitled to damages for loss of future earnings but he left it to the solicitors of both parties to work out the award "according to the salary table exhibited" and to deduct from it Income Tax payable and another 10% for the contingency that the respondent might not serve his full term in the Government service. The appellants being dissatisfied with the decision both on liability and quantum on special and general damages have appealed to us.

On the issue of liability, we do not think that the learned Commissioner was wrong in law or in fact in his conclusion. From the whole evidence including the sketch plan, the second appellant was correctly held entirely to blame. There was no dispute that the respondent was proceeding along a major road (Jalan Abdul Rahman) from the direction of Muar Town towards Kampong Parit Jawa and the second appellant was coming out from a minor road (Jalan Sultan Ibrahim) into the main road intending to turn right towards Muar. There was evidence to support the conclusion that he did not stop at the "Stop Look Go" sign at the junction before turning right into the main road and was therefore guilty of negligence in colliding into the respondent but it was the appellants' contention that the accident was contributed to by the respondent's own negligence in giving light signal to turn right into a minor road (Jalan Parit Haji Maki) and then suddenly changing his mind by going back to his former position and proceeding straight on towards the direction of Kampong Parit Jawa. Even if the respondent did change his direction (which the respondent denied and the denial was accepted by the learned Commissioner) we are satisfied that the collision could not have occurred if the appellant's motor car had stopped at the junction and allowed the respondent's motor cycle which had the right of way to pass the junction completely first before turning right into the main road. Applying the test set by this court on contributory negligence in *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.*[1] and *Tan Tsin Keong* v. *A. Somanaidu*[2], the respondent was obviously blameless and we find the appeal against liability has no merit whatsoever.

On the issue of damages, the appeal is confined to: (1) the global award of $70,000/- for pain and suffering and loss of amenities; and (2) the unspecified award for loss of future earnings which the parties were ordered to assess. We wish to observe at this early stage that it is the function of the Court to assess damages and where the quantum is not agreed upon by the parties on any item as in the present case, it is both unreasonable and undesirable to order them to assess the damages themselves. The reason for our observation needs no explanation. Now, going back to the appeal proper, on other items both parties have before us made certain concessions. On the award of $1,170/- as special damages we agree with both parties that it should be reduced to $300/- as there was only evidence to support

the latter amount. Similarly, the award of $500/- for special shoes should be set aside for lack of any evidence that such shoes are required by the respondent. He is in fact capable of using ordinary shoes except that the heel of the left shoe must be made a few centimetres higher to compensate the 5 cm shortening of the left leg. As to the cost of surgical operation to the left hip and left knee, the evidence showed that the sum estimated by the specialist's evidence was in fact $20,000/- and as such the award of $18,000/- should remain.

On general damages for pain and suffering and loss of amenities, counsel for the appellants argued that the learned Commissioner erred in making a global award of $70,000/- as it was manifestly excessive and completely out of line with the general trend of awards for similar injuries particularly when compared with the more serious case of amputation above the knee. We have been told that no Court in this country has awarded more than $50,000/- for total loss of one leg. In the Court below the appellants cited four cases for comparison and submitted that the global award should be $27,000/- only, whilst the respondent thought that the figure should be $113,000/- based on itemization process. For the hip injuries a figure of $40,000/- was advanced based on the awards made in *Lim Soon Poh* v. *Ng Kong Lum*[3] ($17,500); *Tan Thua Chye* v. *Tan Chun Eng*[4] ($12,000). For the fracture of left tibia and fibula and leg shortening by 5 cm, $20,000/- was claimed relying on *Abdul Wahab bin Kachi Mydin* v. *Gan Ah Hoe*[5] ($21,000); *Marie Decruz (Widow)* v. *Loo Siew Kong*[6] ($36,000) and *Teh Hwa Seong* v. *Chop Lim Chin Moh & Anor.*[7] ($20,000). As for the knee injuries $15,000/- was suggested based on the award of $6,000/- given in *Shari bin Abdul Rahman* v. *Attorney-General*[8]. For the ankle injury, $12,000/- was canvassed on the authorities of *Tay Yong Kee* v. *Ng Aik Peng*[9] ($12,000); *Chan Chook How* v. *Tan Nyoke Hoe*[10] ($7,000) and *M.U. Abdullah s/o Mohamed bin Ali* v. *Mohd. Mazir bin Mohd Hassam & Anor.*[11] ($12,000). A sum of $6,000/- was claimed for the scars based on *Lim Meng Choo & Anor.* v. *Paya Lebar Bus Service.*[12] For loss of amenities, a further sum of $20,000/- was claimed; thus making a total figure of $113,000/-. Taking into account overlapping, it is the respondent's argument that the global award of $70,000/- was fair and correct and consistent with the itemization process. We note however that the figure of $40,000/- claimed for the hip injuries is far in excess of the awards given in the authorities relied upon by the respondent. In our view, at the most it should be in the region of $20,000/- only. It should be noted that a separate sum has also been awarded for the cost of operation of the hip joint as a measure of reducing his pain and suffering. This also applies to the knee injury. Similarly, the figure of $20,000/- claimed separately for loss of amenities would appear to be wrong as most of the awards cited as authorities are inclusive of this item. In the circumstances, we find the figure of $113,000/- on the itemization process to be highly inflated and unreliable and as such it cannot be said that the figure is consistent with the global award made by the learned Judicial Commissioner. In support of his submission, counsel for the appellants relied on three unreported cases found in *Dass* on Quantum Vol. 2 namely: *Marie Decruz (Widow)* v. *Loo Siew Kong* (p.354) – $36,000; *James Marian & Patrick s/o Maselamani* v. *Teh Kim Kan & Anor.* (p.322) – $20,000 and *Liu Kam @ Liew Chong Peng & Anor.* v. *Lee Tai Hing & Anor.* (p.251) – $22,000. He also relied on *Elangovan* v. *Lee Yew Kow & Anor.*[13] where an award of $38,000/- was made for pain and suffering for amputation of one leg above the knee. In an appeal against quantum in running down cases, this Court has laid down in *Mahmod bin Kailan* v. *Goh Seng Choon & Anor.*[14] that the questions to be asked are – has the trial judge acted on a wrong principle of law or had he misapprehended the facts or had he made a wholly erroneous estimate of the damage suffered? To do so we have to consider the circumstances of the present case. Immediately after the accident on April 30, 1976, the respondent aged 23 years received primary treatment at the District Hospital, Muar. He was first referred to University Hospital, Kuala Lumpur on July 9, 1976. The expert opinion of Dr. Soo Fook Mun (PW 3) vide his medical report dated June 13, 1978 was as follows:–

> "This man has sustained a posterior dislocation of his (L) hip and a closed fractures of his (L) tibia and fibula. The fractures have united in satisfactory alignment. His residual disabilities are:–
>
> i) Stiff (L) hip due to the avascular necrosis. He has very limited movement in his (L) hip as depicted above. This condition can deteriorate with age and will be difficult to manage. He will definitely require further surgery – a total hip displacement.
>
> ii) Stiff (L) knee: This can be corrected by a plastic operation.
>
> iii) Stiffness of his ankle which is permanent and so is the

shortening of 2". The wasted muscles can be built up by intensive exercises.

As a result of the stiffness of his (L) hip, (L) knee and (L) ankle he cannot squat fully, run, cross-leg sit, tie his shoe laces nor cut his toe nails.

The pain in the (L) hip can only probably be relieved by surgery."

The latest medical report dated June 4, 1982 contained the following opinion from Dr. Soo:—

"Further to the Specialist Report dated 13.6.78 the avascular necrosis in the (L) hip joint has deteriorated further leading to a subluxation of the (L) hip joint. This has also led to a decreased range in movement of the (L) hip joint in all directions as shown in the above findings. The (L) hip is in a fixed external rotation deformity.

The (L) knee range of movement has increased compared with the examination on 13.6.1978, but the knee is developing osteoarthritic changes. The (L) ankle range of movement has remained the same.

His pain and stiffnes in the (L) hip is caused by the avascular necrosis. His inability to run, squat, sit crossed legged and walk more than one and a half mile is also due to the avascular necrosis of the (L) hip. His inability to climb stairs is due to the avascular necrosis in the (L) hip joint and the weak (L) lower limb muscles and the stiffness of the (L) knee joint. His low backache, a new complaint, is due to the avascular necrosis of the (L) hip which has led to a pelvic tilt.

This young man has a very difficult medical problem for treatment. Avascular necrosis at this age is difficult to treat. He will definitely require total hip arthroplasty (artificial hip joint) of the (L) hip. This will reduce his pain, increase the range of movement in the (L) hip but not to the normal range as on the (R). Even with a successful total hip arthroplasty procedure, he will not be able to lead a normal life (e.g. jogging, any game that involves running). The total hip arthroplasty may require replacement later in his life.

The alternative to a total hip arthroplasty (artificial hip joint) is to fuse the present hip joint. With this fusion, he will lose all movements of the hip joint, resulting in a stiff but pain free hip.

The osteoarthritic changes that have developed in the (L) knee will deteriorate as he gets older and at some stage will need surgical intervention.

The 5 cm shortening of the (L) lower limb will be permanent."

Dr. Soo in explaining his final report testified that an artificial hip joint had an average life span of about 10 years and a revision arthroplasty might be necessary after that. The Doctor was of the opinion that the alternative method of fusion of the present hip joint would be more favourable for a person of respondent's age although it would entail loss of movement at the hip. But unlike the artificial hip joint method he would be free from hip pain and be able to carry heavy objects and do heavy work since the joint would stand all abuses. As for the artificial joint at the knee it has also to be replaced later on in his life. The cost of surgical operation for the hip and the knee joint would be about the same. As regards hospitalization, the respondent was in Muar District Hospital for over two months and was in University Hospital for another two months from July 9 to September 6, 1976. When transferred to University Hospital, the whole of his lower left leg was in plaster. As for loss of amenities there was evidence that the respondent was active in sports prior to the accident. He played rugby for his former school (MARA College) and he was a swimmer for the school club. Now he cannot do gymnastics, cannot tie his shoe lace, cut his toe nails and has difficulty in driving a motor car. Having regard to the evidence we find the leg injuries suffered by the respondent were quite severe. As a result of dislocation of the hip joint and the knee joint, he has to undergo in the near future difficult operation and treatment at these joints. There is also a strong probability that he has to undergo the same operation and treatment after ten years at the hip and about twenty years at the knee. The pain and suffering would therefore resurface at a future date even if he were to opt for fusing the hip joint. In the circumstances we do not think that the award of $27,000/- as suggested by counsel for the appellants should be the correct compensation. However, we are of the view that global awards for pain and suffering and loss of amenities ought not to exceed those given by the Courts in cases involving total loss of the whole leg in the absence of the special circumstances. In *Murugan s/o Poomie* v. *Lew Chu Cheong*[15], Chang Min Tat J. made an award of $20,000/- for pain and suffering and loss of amenities where the plaintiff lost one leg. In *Ibrahim bin Samsudin* v. *Kong Pak Kooi*[16], Wan Yahya J. made an award of $46,500/- for general damages in respect of amputation below left knee followed subsequently by another operation above the same knee. Again in *Yen Kwai Lan (M.W.)* v. *Lim Eng Hing @ Lim Syed Tiok*,[17] Anuar J. made an award of $45,632/- in the case involving amputation above the right knee. The Federal Court in *Mahmod bin Kailan* v. *Goh Seng Choon & Anor.*[14] did not disturb the finding of the trial court for an award of $35,000/- for pain and suffering and loss of amenities where the right leg of the plaintiff was amputated above the

knee. It should be noted that the main injuries suffered by the respondent were all confined to the left leg viz – the left hip, knee and ankle, and the consequential pain and suffering and loss of amenities are less severe than if the use of that leg has been lost permanently as a result of amputation. The respondent can still use his leg and though limping, he can still walk unaided and drive a motor car. There are of course restrictions in movement of the leg and osteoarthritic changes but we think the injuries suffered are not as severe as those cases involving amputation of the whole leg. Having regard to these awards on leg amputation above the knee, we are of the view that the award of $70,000/- is a wholly erroneous estimate of the damage suffered. We therefore agree with the appellants that the award is manifestly excessive and we would reduce the award to $40,000/- which we think is fair and equitable compensation under this item. Although it is almost impossible to standardize damages for pain and suffering and loss of amenities in running down cases, it is in the interest of all concerned that the trend of awards should be maintained so that Insurance Companies and practitioners have some idea as to how these cases will ultimately be dealt with here. This will facilitate out of court settlement or at least agreement on quantum and will no doubt benefit road accident victims (see *Seenivasan & Anor.* v. *Lim Yew Seng*[18]). The learned Commissioner did not seem to consider adequately the authorities cited before him. Nor did he give any indication as to how he had arrived at his estimate. Had he done so we might probably have found it difficult to disturb his assessment.

We would now consider the dispute on loss of future earnings. Since the case of *Low Ah Tow* v. *Yusof bin Kayab*[19] was decided by the Court of Appeal, loss of future earnings have always been regarded as general damages in this country. As such we do not agree with the argument of learned counsel for the appellants that in order to succeed, such claim must be specifically pleaded. This point has been reaffirmed by this Court recently in *Ngooi Ku Siong (f) & Anor.* v. *Aidi Abdullah.*[20] The respondent (PW1) aged 23 years was an undergraduate of the University at the time of accident in April, 1976. After graduation in 1978, he testified that it was his intention to join the Administrative and Diplomatic Service (PTD in Bahasa). He was called for an interview but was turned down. He then joined the National Archives. He claimed there was a very big difference in emoluments between the PTD (salary scale A19) and National Archives Service (salary scale A20). As such he suffered substantial future loss of earnings based upon the two salary scales and consequential loss of promotion prospect. His failure to join the PTD was supported by Haji Mohd. Adam bin Anas (PW2), a member of the Public Service Commission and also a member of the Board of Interview who interviewed the respondent. According to PW2, it was the Board's opinion that respondent's physical disabilities – as he was limping badly – rendered him unfit for acceptance. This was because of the fact that a successful applicant on being selected had to attend a course in INTAN which included Police and Military trainings and Outwardbound School. According to PW2, the respondent's application to join the PTD was rejected entirely by reason of his physical disabilities. From about 930 applicants, the respondent was one of 400 candidates called for interview of which 200 would finally be selected. Thus PW2 seemed to claim that the respondent had all the required qualifications and would have been accepted had it not been for his physical disabilities. Apart from difference in salary scales, an officer in the PTD unlike Archives Department is transferable to all departments and as such offers better prospect of promotion. PW2 also testified that most officers in PTD got promoted after 5 years. It was therefore argued that if the respondent had been accepted into the PTD there was at the worst a possibility for him to get a promotion after five years and in accordance with the Privy Council authority in *K. Ratnasingam* v. *Kow Ah Dek & Anor.*[21] such mere possibility should entitle him to loss of future earnings. It is also argued that unlike the facts in *Lim Eng Kay* v. *Jaafar bin Mohd. Said*[22], the respondent in this appeal was deprived of the opportunity to join the PTD by reason of the injuries sustained by him in the accident. There was no room for speculation – so it was argued. The respondent's case was therefore founded almost entirely on the strength of PW2's evidence that his failure to be accepted into the PTD was due to his limping and not because of any other cause. However, we are of the opinion that the reason given by PW2 for respondent's rejection cannot be accepted as the true and official reason of the Board. At the most, he can only speak for himself and not for other members of the Board. We do not think that PW2 is a competent witness to give such privileged information on behalf of the Board and much less on behalf of the Public Service Commission in whom the power of appointment into the PTD is vested by Articles 139 and 144 of

the Federal Constitution. We can take judicial notice of the fact that there were three members of the Board of Interview. There is no evidence of official record to support PW2's evidence. The presumption under Section 114(g) of the Evidence Act is that if the other two members of the Board or the Secretary or Chairman of the Public Service Commission had been called as witnesses by the respondent, they would have given unfavourable evidence against him. As such there was no reliable evidence before the learned Commissioner that the respondent was rejected solely because of his physical disabilities. We note, not with any disrespect, that the respondent only obtained B.A. (Hon.) in Geography and although he was one of the 400 candidates called for interview out of 930 applicants it did not necessarily follow that all the 400 would be successful however perfect their physical condition might be as there were only 200 vacancies. It can reasonably be inferred that the respondent had to compete fiercely on qualification with the remaining 399 candidates called for interview and unless the Court has evidence of the official reason for his rejection by the Public Service Commission, it is not unreasonable to conclude that the respondent's limping could not have been the cause of his rejection by the Commission. The fact that the respondent has been accepted without any difficulty by the Archives Service which is also a Government Department under the Ministry of Culture Youth and Sports, seems to suggest that he is serving in a suitable Department having regard to his qualification. We therefore hold that PW2's testimony as to the reason for respondent's rejection was a mere conjecture. There was therefore no loss of opportunity to join the PTD as a result of the accident and no consequential loss of promotion prospect. We accordingly find loss of future earnings had not been proved on balance. Be that as it may, we are of the view that the respondent should be compensated for injury to his earning capacity. It is argued by counsel for the respondent that had it not been for the accident, the respondent would have graduated in 1977 instead of 1978 and as such the Court should award him damages for such loss. The learned Judicial Commissioner had apparently rejected this particular claim. In our view it was rightly rejected as the claim is too speculative in nature and unsupported by evidence on balance. In the absence of evidence of his academic performance before accident by the University authority, there was nothing on record to suggest that he would certainly have graduated with honours in 1977 if the accident had not happened. On the other hand, there was evidence that he was very active in sports and although the accident did deprive him of his studies for four or five months, the deprivation of participating in sports would probably have forced him to concentrate fully on his studies and contributed significantly to his graduation with honours in 1978. In the circumstances, we think the learned Judicial Commissioner was correct in not making any award on the basis claimed by the respondent. Further, such claim relates to a pre-trial loss and would be tantamount to special damages which should be specifically pleaded. As stated earlier, we are of the view that the respondent should be entitled to some compensation for loss of earning capacity on a lump sum basis. He has to undergo a second operation later on in his life both on the knee and hip joints. Accordingly, there is a substantial or real risk that he will sometime in the future suffer loss of earning capacity. "It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages" – per Lord Denning in *Fairley* v. *John Thompson Ltd.*[23] which was cited with approval by this Court in *Ti Huck & Anor.* v. *Mohamed Yusof.*[24] To succeed in a claim for future earnings, the loss should be real and assessable and not speculative. It should however be noted that merely because an injured child or adolescent is a non-wage-earner it does not mean that he can never be entitled to damages for loss of earning capacity or loss of future earnings. Where an infant or an unemployed person sustained injuries to an extent that he became no better than a vegetable, it would be reasonable to conclude that he has suffered a total or near total loss of capacity to earn from the time of accident, and as such it must necessarily follow that he would suffer a loss of future earnings. In such a compelling case, the loss should not be treated as speculative so as to deprive the injured plaintiff from being awarded general damages for loss of future earnings (see *Yang Salbiah & Anor.* v. *Jamil bin Harun).*[25]. The incapacity of the respondent in this appeal does not come anywhere near *Yang Salbiah's* case and for reasons already stated, there is in fact no real loss of future earnings. He was not earning at the time of accident and was readily employed by the Archives Department after his graduation from the University. The order of the High Court on such loss must

therefore be set aside. Taking into account all past and future contingencies, we are of the view that an award of $12,000/- for loss of earning capacity would be fair and adequate in this particular case.

For the above reasons we dismiss the appeal against liability but we allow the appeal against quantum. The order of the learned Judicial Commissioner on damages is set aside and substituted with the following order:—

1. Special damages — $300/- with interest at 3% per annum from date of accident to date of realization;

2. General Damages —

| | |
|---|---|
| (i) pain and suffering and loss of amenities .. .. | $40,000/- |
| (ii) estimated cost of surgical operation of the hip and knee joint .. .. | $18,000/- |
| (iii) loss of earning capacity .. | $12,000/- |
| Total .. | $70,000/- |

Item (i) of general damages shall be with interest at the rate of 6% per annum from date of filing the writ to date of trial and thereafter at 8% per annum until date of realization.

We order that the costs of this appeal be paid by the respondent and the deposit be refunded to the appellants. The order as to costs in the court below should remain.

*Order accordingly.*

Solicitors: *Tay, Tee & Nasir; Ranjit, Thomas & Kula*

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## MANICKAM v. INTHERAHNEE

**[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) March 5 & September 17, 1984]**

**[Johore Bahru — Federal Court Civil Appeal No. 318 of 1982]**

*Family Law — Custody of infants — Welfare of infant — Wishes of child of 8 years of age — Consequence of uprooting child from surroundings — Care and attention of natural mother superior to that of step mother — Guardianship of Infants Act, 1961.*

In this case the respondent had left the matrimonial home and had taken her younger child Anand, aged 4 years, to live with her. The elder boy, Nantha, remained with the appellant, his father, in Johore Bahru. The appellant had taken a second wife, with whom he had a child. The respondent applied for custody of both the children. The learned Judicial Commissioner allowed her application and the appellant appealed.

**Held**, dismissing the appeal: (1) the learned Judicial Commissioner had acted on the right principles, having in mind always that the paramount consideration is the welfare of the child;

(2) in this case the elder child being only 8 years of age at the time of the hearing and then in the custody of the appellant and his family could not reasonably be expected to express any independent opinion on his preferences;

(3) although by the order the child would be uprooted from the surroundings and from relatives to whom he had grown accustomed since 1977, the learned Judicial Commissioner in this case was correct in considering the wishes of the unimpeachable parent;

(4) the care and attention of the natural mother can reasonably be expected to be superior to that of a step-mother particularly one who has a child of her own and with every prospect of additions to the family.

*Case referred to:*

(1) *Re Thain* [1926] Ch. 676.

FEDERAL COURT.

*E. Ramasamy* for the appellant.
*G. F. Nelson* for the respondent.

*Cur. Adv. Vult.*

**Wan Suleiman F.J.** (delivering the Judgment of the Court): The appellant is the natural father of 2 boys, Nantha Kumar (Nantha) and Anand Kumar (Anand) now aged 9 and 4 years respectively. By an Originating Summons dated January 7, 1982 the respondent, their natural mother had applied for custody of both the children. At the